No. 76-939

In the Supreme Court of the United States

OCTOBER TERM, 1976

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; AND
BELL TELEPHONE LABORATORIES, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO ACCELERATE CONSIDERATION AND TO MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF CERTIORARI UNDER 28 U.S.C. 1651(a)

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STATEMENT

In pre-trial orders dated November 24 and December 22, 1976, the district court held that it had antitrust jurisdiction "of at least some of the aspects of" a civil action filed by the United States on November 20, 1974, charging petitioners with violating Section 2 of the Sherman Antitrust Act, 15 U.S.C. 2.[1] Petitioners have filed, pursuant to 28 U.S.C.

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[1]The district court also noted, in so holding, that as a preliminary matter "some—or much—of the conduct and practices of defendants upon which plaintiff bases its charges of conspiracy to monopolize, attempts to monopolize and monopolization might well be subject to the doctrine of primary jurisdiction" and, if so, would be referred at the appropriate time to the Federal Communications Commission. Pet. App. 8a, 10a.

1651(a), an application in this Court for a common law writ of certiorari to the United States District Court for the District of Columbia, seeking interlocutory review of those two pre-trial orders. Petitioners simultaneously have sought review of the district court's orders by filing, also pursuant to 28 U.S.C. 1651(a), a petition for certiorari in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals has not yet issued any order in response to that petition. Based upon the pending application for an extraordinary writ in the court of appeals, petitioners alternatively have asked this Court, under 28 U.S.C. 1254(1) and Rule 20 of this Court's Rules, for a statutory writ of certiorari before judgment in the court of appeals.

In connection with their petition to this Court, petitioners have filed two motions: (1) a motion for leave to file a petition for an extraordinary writ, and (ii) a motion to accelerate consideration of their petition for a writ of certiorari. The United States opposes both motions and urges this Court to deny them forthwith.

The government's complaint in this case (Pet. App. 50a) charges petitioners—American Telephone and Telegraph Company, Western Electric Company, Inc., and Bell Telephone Laboratories, Inc.—with attempting and conspiring to monopolize, and monopolizing, interstate trade and commerce in the two broad markets of telecommunications service and telecommunications equipment and in several included submarkets. The complaint seeks a declaratory judgment that defendants have violated Section 2 of the Sherman Act, 15 U.S.C. 2, and seeks various forms of equitable relief, including an order requiring divestiture by AT&T of such research, manufacturing, and service components as may be found necessary to insure competition in the telecommunications service and equipment markets and sub-markets (Pet. App. 63a).

The district court on February 20, 1975, *sua sponte*, stayed discovery in order to consider and determine certain threshold jurisdictional issues. Extensive briefing by the parties was followed by a hearing on July 23, 1975. Thereafter, at the court's request, the Federal Communications Commission submitted a brief *amicus curiae* setting forth its views on the jurisdictional issues.[2] The parties filed memoranda responding to the FCC's brief. Subsequently, the court ordered a further hearing and requested the parties and the FCC to brief the question whether Congress, by enacting the Federal Communications Act of 1934, 47 U.S.C. 151 *et seq.*, intended by implication to provide the defendants with complete immunity from antitrust prosecution with respect to their communications activities (Pet. App. 2a-3a).

Petitioners contended below, and contend in this Court, that even though Congress did not provide the FCC with broad explicit antitrust exemption authority, it nevertheless intended to exempt their communications activities from the antitrust laws by reason of the "pervasive scheme" of federal and state regulation. In general, the United States and the FCC took the position that the Congress which had provided the Commission with explicit, narrow, antitrust exemption authority, 47 U.S.C. 221(a), 222(c)(1), evidenced no intent to confer such broad antitrust immunity upon the various activities of AT&T and its subsidiaries. Both the United States and the FCC stated that antitrust and regulatory policies were complementary rather than irreconcilable. Similarly, both the United States and the FCC recognized that in view of the special regulated characteristics of the industry the authority to make certain specific and discrete determinations was conferred by

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[2] A copy of the *amicus* brief filed with the district court by the Commission has been lodged with the Clerk of this Court.

Congress upon the FCC, and that an antitrust court might accordingly be required to submit certain questions to the FCC for its preliminary consideration.

The district court, on November 24, 1976, concluded "that the Communications Act does not expressly, or impliedly, repeal the antitrust laws. Neither the language nor the legislative history of the Communications Act supports the conclusion that Congress intended by that Act to grant a total, blanket immunity to defendants from application of antitrust laws, and to place exclusive jurisdiction over all their conduct in the Federal Communications Commission" (Pet. App. 8a). The court noted, however, that "when certain basic communication issues arise in antitrust proceedings, the regulatory scheme prescribed in Title II of the Communications Act for common carriers would seemingly make referral to the Federal Communications Commission imperative" (Pet. App. 10a). Thus, the court concluded that it had antitrust jurisdiction over "at least some of the aspects of" the complaint and allowed discovery in this action to continue. On December 22, 1976, the court issued an order denying petitioners' motion to dismiss the complaint for lack of jurisdiction (Pet. App. 12a).

ARGUMENT

Petitioners' motion for accelerated consideration and their motion for leave to file a petition for an extraordinary writ should be denied.

1. This is not a case in which extraordinary review under 28 U.S.C. 1651(a) is warranted. Such extraordinary review, in conflict with the long-standing policy against interlocutory review in the federal courts, requires more than an issue "of general importance" involving "the orderly administration of justice" (Pet. 24). Petitioners have not demonstrated that this case presents a "really extraordinary cause" requiring an extraordinary remedy. *Ex parte Fahey*, 332 U.S. 258, 260. Ultimately, the only reasons given

by petitioner to justify the review sought are the importance of the question presented and the unusual size and potential expense of the trial of this case (Motion to Accelerate 6-7).[3] This Court has consistently declined to treat the cost of trial as a reason for granting an extraordinary writ. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30; see *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110. Nor does the importance of the legal question alone ordinarily justify use of an extraordinary writ. The trial court must be guilty of a usurpation of power, something far more egregious than merely an allegedly erroneous decision on a question of jurisdiction. *Kerr* v. *United States District Court for the Northern District of California*, No. 74-1023, decided June 14, 1976; *Roche, supra*, 319 U.S. at 27; *Will* v. *United States*, 389 U.S. 90, 95-96. Where this Court has reviewed jurisdictional questions, the lower court decision has put it into conflict with a federal agency, *Far East Conference* v. *United States*, 342 U.S. 570, or threatened defendants with severe sanctions where it was alleged that Congress intended to provide them with a means for correcting wrongs and avoiding all legal liability, *United States Alkali Export Association* v. *United States*, 325 U.S. 196, 203-204.[4] There is no such conflict with another federal agency here, since both the FCC and the United States agree that the district court has jurisdiction over substantial parts of the

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[3]The United States believes that, while the litigation of this case will be lengthy, petitioners' estimate of the amount and expense of the discovery that ultimately will occur is vastly excessive. As discovery progresses procedures can be, and to some extent already have been, developed to expedite and curtail the need for such an extremely broad document search (Pet. 20, n. 20). Moreover, the United States already has agreed to conduct its file search in a manner which relieves petitioners of much of the expense of traditional discovery.

[4]Petitioners there claimed the district court's exercise of jurisdiction denied them the "opportunity, with the expert aid of the Trade Commission, to retrace their steps, without being subjected to the penalties of the law." 325 U.S. at 203.

complaint and that during the course of the litigation certain issues may be referred to the Commission for its consideration.[5] Nor does the exercise of jurisdiction deny petitioners some special sanctuary, since they concede the Commssion has jurisdiction over much of the conduct which is the subject of this complaint (Pet. 47-48).

Moreover, review of the present jurisdictional question would be unlikely to resolve the entire question of jurisdiction, and would instead open the door to repeated interruption of orderly trial procedures for additional interlocutory review of subsequent jurisdictional questions. All the district court decided here is that it has jurisdiction over at least some of the complaint. Affirmance of that order would not avoid specific questions regarding antitrust court jurisdiction over particular acts and practices subject to or related to FCC regulation. Conversely, reversal of the district court's limited order would be inappropriate. Substantial parts of the complaint involve activity not subject to the FCC's direct control under Title II of the Communications Act, the common carrier provisions upon which petitioners principally rely in asserting antitrust immunity. The remaining alternative presently available to this Court is an anticipatory resolution, issue by issue, of individual jurisdictional claims, involving an extremely subtle interplay of facts and statutes, where the parties have not yet had a chance to flesh out the exact dimensions of the

[5]Although the Court has not always deferred to an agency's judgment on the merits of an antitrust court's jurisdictional claims, *e.g.*, *Hughes Tool Co.* v. *T.W.A.*, 409 U.S. 363, the problem is decidedly different where the question is issuance of an extraordinary writ to resolve a jurisdictional claim. The agency's concurrence strongly suggests that the court's assertion of jurisdiction is not a usurpation of power, thus rebutting any claim of "clear and indisputable" right to the writ. *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384, quoted with approval in *Kerr*, *supra*, slip op., p. 9. In any event, where agency and court agree, there is no conflict which requires immediate resolution by a higher authority.

dispute. The impropriety of such an approach highlights the lack of justification for interlocutory review of what is, after all, a preliminary jurisdictional determination.

Granting the requested extraordinary writ in the present circumstances would also be inconsistent with Congress' desire to limit piece-meal review in government civil antitrust cases. For many years Congress effectuated that goal by limiting appellate review of such cases to this Court. The Expediting Act, prior to recent amendment, deprived the courts of appeals of both appeal and extraordinary writ jurisdiction. *Tidewater Oil Co.* v. *United States*, 409 U.S. 151. While amendment of the Expediting Act in 1974, 88 Stat. 1706, 1709, 15 U.S.C. (Supp. V) 29, conferred jurisdiction upon the courts of appeals over final judgments in government civil antitrust cases, their appeal jurisdiction over interlocutory orders was limited to orders granting or denying injunctive relief. The legislative history of the 1974 amendments makes it clear that the restrictions on the appellate courts' interlocutory appeal jurisdiction were designed to avoid piece-meal review of government civil antitrust litigation. S. Rep. No. 93-298, 93d Cong., 1st Sess. 4 (1973) *Kaufman* v. *Edelstein*, 539 F. 2d 811, 815-816 (C.A. 2). Due respect for Congress' will, therefore, would require a conservative use of extraordinary writs by this Court in dealing with government civil antitrust cases.

2. Under Rule 31(2) of the Rules of this Court, a petition for an extraordinary writ "shall set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate processes." The identical relief sought by petitioners in this Court is available by petition for an extraordinary writ in the United States Court of Appeals for the District of Columbia Circuit. Indeed, as indicated above, petitioners have pending an application for such a writ in that court. Because of the circumstances of this case previously discussed, there is

no reason to by-pass the court of appeals, especially when that court is particularly experienced with administrative law issues generally, and with communications law issues, particularly.[6]

Petitioners have not demonstrated that this case, in its present posture, presents any issue "peculiarly appropriate" for action by this Court. *Ex parte United States,* 287 U.S. 241, 249. Cf. *Bucolo* v. *Adkins,* 424 U.S. 641, 643. On the contrary, initial resort to the court of appeals would seem more consonant with the purposes of the 1974 Expediting Act Amendments. By that legislation, adopted in part in response to suggestions by members of this Court,[7] Congress conferred upon the courts of appeals jurisdiction in government civil antitrust cases with respect to final judgments, interlocutory orders granting or denying an injunction, and extraordinary writs. *Kaufman* v. *Edelstein, supra.* Since Congress acted in order to relieve the burden on this Court, it would be incongruous for the Court to by-pass the court of appeals in the absence of compelling need, a factor which is not present here.

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[6]In *United States Alkali Export Association* v. *United States, supra,* upon which petitioners primarily rely, this Court granted a common law writ of certiorari to review an order of the district court only because *no* other relief was available. This Court noted that its rule is to decline to issue extraordinary writs prior to review in a court of appeals, either by ordinary appeal or extraordinary remedy, but "where, as here, sole appellate jurisdiction lies in this Court, application for a common law writ in aid of appellate jurisdiction must be to this Court." 325 U.S. 202. The same situation prevailed in all civil antitrust cases brought by the United States prior to the amendment, in 1974, of the Expediting Act, 88 Stat. 1706, 1709, 15 U.S.C. (Supp. V) 29. See *Far East Conference* v. *United States,* 342 U.S. 570; *DeBeers Consolidated Mines, Ltd.* v. *United States,* 325 U.S. 212.

[7]S. Rep. No. 93-298, 93d Cong., 1st Sess. (1973), accompanying S.782, the 1974 Antitrust Laws Amendments, notes on page 8 that, "One of the principal arguments offered in support of the proposal is to relieve the Supreme Court of the burden of hearing the numerous cases coming to it under the Expediting Act. * * * Almost all the present Justices have, both in and out of Court, asked that these cases go first to the court of appeals."

Petitioners' complaint here goes not to the expense and delay of appellate review, but to the costs of discovery and litigation over what they predict will be a ten-year period (Pet. 26). Petitioners' goal is to obtain a decision from this Court by the end of this Term (Motion to Accelerate 6). In this context, allowing the case to follow the normal appellate course would not add significant delay. There is no reason to believe that the court of appeals would be indifferent to petitioners' request for expeditious consideration of their petition. Cf. *Aaron* v. *Cooper,* 357 U.S. 566, 567. If that court summarily denies the petition, petitioners may seek certiorari before this Court without delay. If the court of appeals should rule on the merits of the petition, it can be expected to rule in an expeditious manner so that this Court could, if it so chooses, hear the case early next Term.

3. The same reasons lead to the conclusion that this Court should not take the extraordinary step of granting certiorari before judgment in the court of appeals under 28 U.S.C. 1254(1). Rule 20 of the Rules of this Court provides that this Court will issue a writ of certiorari to review a case before judgment in the court of appeals only upon a showing that the "case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." This Court has, in the past, granted common law or statutory certiorari before judgment only in cases involving: (i) issues similar to those already pending before the Court, *Bolling* v. *Sharpe,* 344 U.S. 873, (ii) relations with foreign powers, *Ex parte Peru,* 318 U.S. 578,[8] (iii) extreme national emergency,

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[8]In *Ex parte Peru,* this Court granted a motion for leave to file a petition for a writ of prohibition or mandamus directly to the district court. In so doing, it effectively applied the standard contained in Rule 20. This Court explained that "the case is one of such public importance and exceptional character as to call for the exercise of our discretion to issue the writ rather than to relegate the Republic of Peru to the circuit

Youngstown Co. v. *Sawyer*, 343 U.S. 579, and (iv) the potential for a constitutional crisis and confrontation extending beyond the bounds of the particular litigation, *United States* v. *Nixon*, 418 U.S. 683. As indicated above, petitioners have demonstrated no exceptional political, economic, or social significance pertaining to this case which would require immediate resolution by this Court.

4. Petitioners' motion for accelerated consideration of their alternative petitions for a writ of certiorari would, if granted, effectively amount to granting certiorari. We have set forth various reasons, unrelated to the substantive merits of petitioners' exclusive jurisdiction argument, why we believe that this Court should deny petitioners' motions.[9]

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court of appeals * * *. The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State." 318 U.S. at 586-587.

[9]It may be appropriate for this Court to dismiss the petition for a statutory writ of certiorari before judgment on the ground that it has no jurisdiction to consider the petition pursuant to 28 U.S.C. 1254. *King Bridge Co.* v. *Otoe County*, 120 U.S. 225, 226 (and cases cited). The current case is not "in" the court of appeals for purposes of invoking this Court's jurisdiction under 28 U.S.C. 1254 merely by virtue of the filing of a petition for a discretionary writ. *House* v. *Mayo*, 324 U.S. 42, 44. Unlike the filing of a notice of appeal, the filing of a petition for a discretionary writ does not immediately remove a case from the jurisdiction of the district court to that of the court of appeals.

In *Schlagenhauf* v. *Holder*, 379 U.S. 104, the decision relied upon by petitioners for a contrary interpretation of 28 U.S.C. 1254, this Court granted certiorari only after the court of appeals had considered in depth and issued a decision (one judge dissenting) with respect to a petition for a writ of mandamus. The issue of whether this Court had jurisdiction under 28 U.S.C. 1254(1) to review that decision was not in dispute and was not adjudicated by this Court. 379 U.S. at 109. Moreover, this Court's decision notes that the court of appeals reached the merits of the underlying dispute and decided the issue adversely to petitioner. 379 U.S. at 111. In those circumstances, the parties agreed that the case was "in" the court of appeals. Cf. *Thermatron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336.

We are filing this memorandum in opposition to those motions in order to inform the Court of the views of the United States as to the wisdom of the course of action which petitioners propose and to indicate to this Court that the United States does not acquiesce therein. We believe that a discussion of the substantive merits of petitioners' exclusive jurisdiction claims is not necessary to the proper disposition of the issues posed by petitioners' motions.

However, it is the intention of the United States to oppose the petitions for certiorari, in a brief in opposition to be filed at a subsequent date,[10] with respect to the substantive issue of whether this case falls within the FCC's exclusive jurisdiction.

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[10]A brief in opposition would, of course, be unnecessary if in the interim this Court dismisses petitioners' petition for a statutory writ of certiorari and denies petitioners' motion for leave to file a petition for extraordinary relief. Under Rule 24 of this Court's Rules, the brief in opposition of the United States is currently due on or before February 26, 1977.

CONCLUSION

This Court should deny petitioners' motions for accelerated consideration and for leave to file the petition for extraordinary relief.

Respectfully submitted.

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